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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1980

HUMBERTO ROSALES-LOPEZ,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF THE PETITIONER

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STATEMENT

The relationship of the Petitioner, a Mexican, to the daughter of Virginia Bowling, a Caucasian [R.T. 170] was first raised in the trial during the opening statement of Government counsel who stated that the Petitioner lived with Ms. Bowling and "was the boyfriend of Ms. Bowling's daughter." [R.T. 165]. During the Government's opening statement reference was also made to "a piece of paper with the words, 'I love you, Chuy,'

and when asked who Chuy [1] was, Mrs. Bowling stated it was her daughter's husband." [R.T. 174-175].

The first testimony touching upon the relationship of the Petitioner was first solicited by Government counsel who had Ms. Virginia Bowling state that the Petitioner was dating her daughter and living at her house. [R.T. 360] [2]

ARGUMENT

A. The error was of constitutional magnitude.

Aldridge v. United States, 283 U.S. 308 (1931) held that the trial judge's discretion concerning voir dire is "subject to the essential demands of fairness." 233 U.S. 305, 310. [3]

The decisions of Aldridge and Ham v. South Carolina, 409 U.S. 524 (1973), established on either constitutional due process (Fifth Amendment) or right to an impartial jury (Sixth Amendment), call for reversal in light of the potential prejudice against a Mexican in the context of this criminal case.

This case should be decided on a constitutional basis, because the error is so egregious and the remedy (mandatory inquiry as to racial bias) so simple. Because this is a federal criminal case, the Court may prefer to decide the issue based upon the requirements of federal criminal practice (as distinct from federal review of state criminal proceedings) so

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1/ A reference to the Petitioner. [R.T. 360, App. 28].

2/ The relationship between the Mexican Petitioner and the Caucasian daughter of the Government's witness Bowling (unindicted co-defendant) explained the Petitioner's presence at the Bowling residence and was not an example of "invited error." Cf. Govt. Br. 12 n.8.

3/ The phraseology is the equivalent of constitutional due process, but Aldridge's brief to this Court (p. 3) placed reliance upon the right of the accused to have an impartial jury under the Constitution of the United States (Amendment VI).

as not to reach the constitutional issue. Cf. Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973); Stern and Gressman, Supreme Court Practice, 286 (5th ed. 1975).

B. The failure to make specific inquiry as to racial prejudice was error under federal law.

1. Federal law for almost 50 years has required inquiry when requested as to potential race or national origin bias.

In 1931 Aldridge stated the rule for federal courts. The limitations of Ristaino v. Ross arise out of the reluctance of federal courts to review the criminal procedure of state courts unless constitutionally mandated, as in Ham v. South Carolina.

If the case is to be decided on a non-constitutional basis, it would be inappropriate to attempt to distinguish, as the Government suggests (Govt. Br. 10, 17-18), the well-established precedent of Aldridge on the factual circumstances of that and subsequent cases. Strange anomalies would result, for it makes no difference to the fairness of a trial whether the accused is charged with a capital crime (Aldridge) or a non-violent victimless offense (Ham). The potential of racial prejudice taints any conviction. This court has not yet undermined Aldridge, and it should not start now.

2. The likelihood of juror bias against the Petitioner because of his Mexican ancestry required inquiry.

The term voir dire is literally defined "to speak the truth." 4/ The questioning procedure is directed to persons under oath with the hope that the potential jurors will indicate the possible bases for challenge. Questioning is directed to stimulate an informational response from the jurors, but the six-minute litany of rhetorical questions

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4/ Black's Law Dictionary, 1412 (5th Ed. 1979).

propounded by the district court in this case manifests the need to enforce the mandate of Aldridge. The Petitioner was Mexican, and the relationship with Mrs. Bowling and her daughter could easily evoke unfounded and irrational juror prejudices against him. Defense counsel recognized the obvious detrimental potential for his client and specifically requested in writing that a single question concerning race be asked. Counsel again requested that the question be asked when not covered by the court's brief voir dire.

In Aldridge, Chief Justice Hughes quoted from People v. Reyes, an early California case supporting the need for an inquiry:

> "Prejudice being a state of mind more frequently founded in passion than in reason, may exist with or without cause; and to ask a person whether he is prejudiced or not against a party, and, if the answer is affirmative, whether that prejudice is of such a character as would lead him to deny the party a fair trial, is not only the simplest method of ascertaining the state of his mind, but is, probably, the only sure method of fathoming his thoughts and feelings." 283 U.S. 308, 313 n.3.

Modern psychology teaches that it is best for the prospective juror, not counsel, to have the principal role in speaking during voir dire so that counsel may determine if this fundamental bias may exist. Once a witness has spoken, counsel may determine that the bias exists even though the juror himself may be unaware of it. To suggest, as does the Government (Govt. Br. 20-21), that some prospective jurors will fail to adhere to their oath and respond honestly to questions probing race bias and that this act or perjury by veniremen justifies no inquiry on race is absurd. Such logic challenges the integrity of our judicial system.

The Government's argument (Govt. Br. 21) that counsel failed to suggest any factual basis for his proposed question concerning race bias is not well founded. The reasoning at the sidebar conference in support of this proposed

voir dire question expressly referred to and incorporated by reference Aldridge which would include the reasons given by Chief Justice Hughes for asking this question. The Petitioner's Mexican appearance was obvious, and the case charged alien smuggling. 5/

Prepared trial counsel know the critical issues of their cases, and, given the nature of extremely restrictive voir dire in federal courts, tailor their proposed questions to the areas that will disclose the most serious bias or prejudice. Here, the defense deemed race an essential question in the context of this case, but the district court did not. In Aldridge, the conviction was reversed even though a specific voir dire question on racist prejudice had not been proposed by the defense as was done here. Here, not only was there a specific question but also a named reference (i.e. Aldridge) to the controlling precedent of this Court was presented to the trial court, but they were rejected.

3. This court is not adopting a new rule or exercising quasi-legislative power.

In Aldridge this court established a per se rule:

> We are of the opinion that the ruling of the trial court on the voir dire was erroneous, and the judgment of conviction must for this reason be reversed." 283 U.S. 308, 315 (Emphasis added).

The Government acknowledges that the jury selection procedure that would systematically exclude identifiable minorities would result in a reversal without inquiry as to actual prejudice (Govt. Br. 30). No matter how intensive voir dire seeks to eliminate racial prejudice in the jurors selected, the established per se rule requires reversal. Failure to inquire

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5/ The visiting judge from the District of Columbia who did not hear the pretrial evidentiary motions prior to trial was both unfamiliar with the facts of the case and the locale. Long distance evaluation by Government counsel as to the attitudes of the San Diego jurors toward a Mexican defendant is little more than speculation.

of prospective jurors as to racial prejudice portends even greater harm to the impartiality of the tribunal (jury), and for the greater harm this Court should not fashion a lesser remedy.

Even if the Court does not choose to follow the per se rule of Aldridge, the Mexican Petitioner's living and involvement with both Mrs. Bowling and her daughter, both Caucasians, is sufficient to indicate that the error is not harmless beyond a reasonable doubt. Chapman v. Califoria, 386 U.S. 18 (1967). The Government's contention that "the evidence against the petitioner was overwhelming" (Govt. Br. 28) does not fairly evaluate the merits of the defense but more importantly usurps the evaluative function of the jury to weigh credibility and demeanor of the witnesses. The three material witnesses (illegal aliens) never identified the guide and had been given Government immunity for their testimony. (R.T. 344-346, 351). The other two Government witnesses, Bowling and Falcon-Zavala, also co-defendants, had been promised recommendations of leniency that resulted in probationary sentences. The jury had to accept the credibility of all five of these witnesses to convict the Petitioner, and that determination, which could have been influenced by racial prejudice against the Petitioner, must not stand.

The Court is not acting in a legislative capacity when it implements the Sixth Amendment requirement of an impartial jury in the context of a federal criminal case. It is the function of this Court to set forth clearly identifiable guidelines that will insure adequate inquiry and effective exploration for racial prejudice in federal jury panels.

The government contends that Petitioner's suggestion that a presumptive requirement of permitting both sides upon request to conduct personal voir dire not to exceed 30 minutes is beyond the question presented. (Govt. Br. 23 n. 20). The

issue as part of the defense effort to obtain voir dire is before the court. [6] This court, in the exercise of its supervisory power, should formulate and promulgate objective criteria for inquiry about racial prejudice. Surely the Government's resort to the limitless discretion of Rule 24 of the Federal Rules of Criminal Procedure is no answer.

The Government's total reliance on Ham and Ristaino is misplaced as they are state cases and inapposite. A formula question, even the example proposed by the Petitioner in the instant case, is no final litmus that would fit the facts of every future federal criminal case. In some cases, experienced counsel might prefer to have the judge make the inquiry as to this sensitive topic if counsel sought such inquiry.[7] In federal courts, the role of the advocate in voir dire has been almost obliterated by the unfettered and "standardless discretion"[8] of the trial judge. In an attempt to balance the needs of efficient court management (i.e. avoid argumentative, didactic, and protracted voir dire) against the fundamental right to have adequate inquiry as a predicate to the exercise of challenges, Petitioner urges that this court require that federal district court judges presumptively grant the request by counsel to personally (orally) participate in voir dire for a short time, 30 minutes per side (approximately one minute per prospective juror in the panel). The counsel

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6/ The record in this case contains an affirmative defense request for 30 minutes voir dire personally by counsel as well a proposed open-ended question concerning racial prejudice. (C.R. 11-1; App. 9).

7/ The right of inquiry does not necessarily mean counsel would exercise in every case, but the trial court's role should be sensitive to reasonable and limited requests of counsel during voir dire.

8/ United States v. Payner, 100 S.Ct. 2439, 2445 (1980). This court refused to recognize a limitless discretion of the district, for to do so, "we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." 100 S.Ct. 2439, 2447.

would have this limited opportunity to probe on points deemed essential in light of the anticipated evidence. The court would still have the right to restrict inquiry to avoid abuse, and this Court could also suggest that district courts first explain and instruct the jury on the purposes and procedure of selection. At the present time, counsel is practically excluded from voir dire in federal courts and, as demonstrated by this case, that surface inquiry may easily fail to detect serious prejudice. Jury questioning must also be adapted to the responses given, and all questions may not be preordained before trial. Admittedly, inquiry as to racial prejudice is a delicate matter, but it is an inquiry in which counsel, if he or she chooses, should be an active participant. In this case, if counsel had been allowed to briefly question, the ensuing appellate litigation may have been avoided.

C. The error was not cured by the other questions asked.

Not only the questions asked but the duration and scope is pertinent to adequacy of the voir dire. The abbreviated style of jury selection was not designed to elicit any information from the prospective jurors that would have permitted the intellegent exercise of challenges for cause or peremptory challenges. The court did ask one of the defense requested instructions concerning the jurors' attitude toward the "alien problem" and "aliens" but failed to relate or connect it to the Petitioner. Many concepts such as economic exploitation of aliens, the unfairness of the immigration laws, the disadvantaged seeking a better life, the criminal offense itself, as well as status lacking the benefits of citizenship are included within the broad term "alien," but the court failed to direct the specifically requested inquiry as to their attitude toward the Petitioner's race or descent. The "alien"

question is deficient for it fails to identify or expose racial prejudice. It is also too broad, similar to a general question as to a lack of any bais or prejudice, and also fails to detect a specific basis as to the critical issue of racial prejudice. This is especially true in this case involving the illegal transportation of undocumented aliens, because the sole juror's response concerned the business of smuggling rather than racial or ethnic prejudice. Thus, prospective juror Rosa, in response to the court's general question concerning "aliens" stated: "It is just a name that they use for the people to transport illegal aliens and to place them intentionally--." (R.T. 146; App. 17) This response had nothing to do with racial prejudice toward the defendant.

The insidious and pervasive influence of racism, often not consciously admitted by its possessor, should not be considered probed by a misdirected and ambiguous general question. The voir dire never confronted or covered the potential of racial prejudice against the Petitioner.

CONCLUSION

Measured either by a constitutional standard or procedural supervision of federal courts, the refusal to present the question concerning racial prejudice was reversible error. For the reasons set forth in the opening brief and this reply brief, it is requested that the judgment of the Court of Appeals be reversed.

Respectfully submitted

2 JANUARY 1991

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